FJC Directions

a publication of the Federal Judicial Center

in this issue

Federal Judicial Center ■ Dolley Madison House ■ 1520 H Street, N.W. ■ Washington, DC 20005

Trends in Summary Judgment Practice: A Summary of Findings

Joe S. Cecil

The 1986 Supreme Court trilogy of summary judgment decisions (*Celotex Corp. v. Catrett; Anderson v. Liberty Lobby; Matsushita Electric Industrial Co. v. Zenith Radio Corp.*) clarified and, in the view of some commentators, revised the substantive law of summary judgment. Case law and commentary suggested that before the trilogy, filing of summary judgment motions and dispositions by such judgments were deterred by uncertainty over the application of Federal Rule of Civil Procedure 56 and by a perception of appellate court hostility to summary judgment. Commentators expected the trilogy to produce increases in the filing and disposition rates.[1]

Proceeding from these assumptions, and in order to assess the effects of the trilogy and to inform the discussion of proposed revisions to Rule 56, the Center undertook a study of summary judgment practice in six federal district courts during 1975, 1986, 1988, and 1989. The study concluded, contrary to our expectations, that the rate at which summary judgment motions were filed as a percentage of civil cases increased during the eleven-year period preceding the trilogy, particularly in torts and civil rights cases, but found no statistically significant increase after the trilogy. The study also found that the rate at which summary judgments are granted has not increased significantly since the trilogy, and that the rate at which summary judgments are reversed corresponds to the rate of reversal for other civil appeals.

The study obtained data on summary judgment practice in the Districts of Maryland, Eastern Pennsylvania, Southern New York, Eastern Louisiana, Central California, and Northern Illinois. The Districts of Maryland, Eastern Pennsylvania, and Central California were chosen because extensive data on summary judgment activity in those districts already existed. Eastern Louisiana, Southern New York, and Northern Illinois were chosen for their past reputation—deserved or not—for restrictive application of summary judgment. Case terminations in these

Joe S. Cecil, a senior research associate at the Federal Judicial Center, served as project director for the summary judgment study. The project team consisted of Laural Hooper, Pat Lombard, Beth Wiggins, James D. Pettler, and C. R. Douglas.

six districts represented 22% of all civil terminations, including settlements, in the federal courts during the time periods under examination.

Data were taken from docket sheets of random samples of cases terminated during the four time periods. The 1975 sample provided a look at summary judgment practice well before the trilogy. The comparison of activity in 1986 and 1988 permitted an assessment of the immediate effect of the trilogy. The 1989 sample was used to confirm the levels of activity found in the 1988 sample. Appeals from summary judgments were examined in the Second and Ninth Circuit Courts of Appeals (these courts were chosen because the Center already had pre-trilogy data).

The study ascertained the percentage of cases in which summary judgment motions were filed and whether the motions in those cases were granted in whole or in part, were denied, or had no action taken. It provided

- a comparison of rates of summary judgment motions and dispositions in different types of cases (e.g., tort, contract, civil rights) and in several district courts across four periods of time
- a determination of the rate at which summary judgments are appealed.

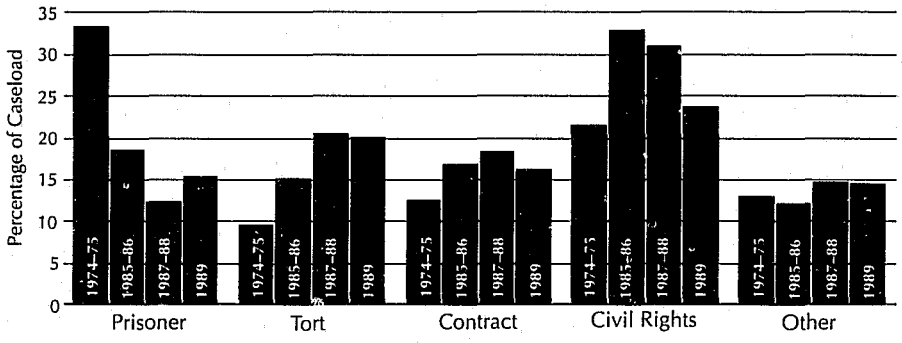
Thus in addition to assessing the effects of the trilogy, the study also sought to determine whether levels of summary judgment activity are influenced by the type of case and by the individual court. The study addressed the following seven issues.

1. Have there been changes in the rate at which motions for summary judgment are filed?

The overall rate at which summary judgment motions are filed has increased since 1975. The level of summary judgment activity differed in different types of cases, however. As indicated in Graph 1, during 1974–1975 motions for summary judgment were filed most often in civil cases brought by prisoners (33% of filings); they were filed in less than 15% of tort, contract, and civil cases other than civil rights, and in 21% of civil rights cases. Since then, such motions have become more common in non-prisoner cases, especially in tort and civil rights cases, but much less common in prisoner cases.[2] As a result, the overall percentage of cases in which motions for summary judgment were filed in the six districts studied showed only a modest, and statistically insignificant, increase from 16% to 18% between 1975 and 1988.

Because prisoner cases followed a distinct trend, they were removed from the analyses, thereby permitting an assessment of summary

Graph 1
Percentage of cases with one or more motions for summary judgment, by case type

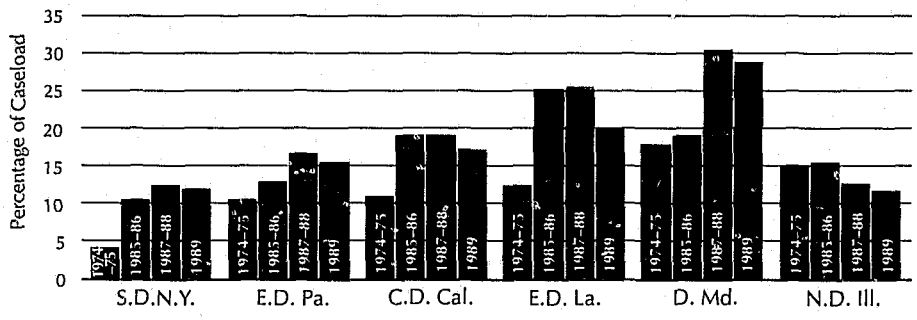


judgment activity in general civil litigation. With prisoner cases removed from the sample, cases with motions for summary judgment increased from 13% in 1975 to 17% in 1986. Since 1986, however, the rate has changed only slightly, increasing only to 19% in 1988, then dropping back to 17% in 1989. Statistical tests indicate that these minor changes since 1986 may be due to chance variations in the sample, rather than being reliable changes reflecting a consistent pattern of activity in the courts. Thus, whatever one might have supposed about the rate at which summary judgment was used in the period immediately preceding the trilogy, that rate showed no significant increase post-trilogy.

2. Are the changes in filing rate limited to certain courts?

As indicated in Graph 2, the extent of activity varies greatly between the districts studied. Southern New York generally had a lower level of summary judgment activity than the other courts and Maryland a higher. In five of the six courts, the rate of filing motions for summary judgment increased during the period from 1975 to 1988, the period of greatest summary judgment activity (although, as explained below, there was no statistically significant increase overall in the time period from 1986 to 1988). In three courts—Southern New York, Central California, and Eastern Louisiana—the largest increases took place from 1975 to 1986. In Maryland, the largest increase occurred between 1986 and 1988. In Eastern Pennsylvania, modest increases occurred across each of the periods from 1975 to 1988. Northern Illinois followed a very different pattern; across twelve years, summary judgment activity remained essentially stable, but then declined to the lowest rate of the six courts.

Graph 2
Percentage of cases with one or more motions for summary judgment (excluding prisoner cases), by district



3. Have there been increases in the rate of filing of motions for summary judgment since the trilogy?

Although the rate of filing of motions for summary judgment has increased since 1975 overall, no statistically significant increases have taken place in the years since the trilogy.

After finding that motions for summary judgment had only increased from 17% of the cases in 1986 to 19% in 1988, we were concerned that the 1988 sample of cases might have been drawn too soon to capture the full effect of the trilogy. The addition of the 1989 sample, which showed summary judgment motions in 17% of the cases, confirmed the overall lack of change in summary judgment activity.

Five of the six courts examined showed no statistically significant increase in the rate of filing of summary judgment motions.[3] Only Maryland showed an increase, but it is believed to be attributable, at least in part, to changes in the mix of cases terminated between 1986 and 1988.[4]

The study also explored the pattern of summary judgment activity in particular categories of cases that might be more strongly influenced by the trilogy. In product liability cases, for example, the rate of filing of motions for summary judgment did show a marked increase in each time period, rising from 24% in 1986 to 31% in 1988 to 41% in 1989. The rate of filing of summary judgment motions in employment discrimination cases, on the other hand, did not increase after the trilogy. The percentage of cases with motions doubled from 1975 to 1986 (from 19% to 38%), remained stable from 1986 to 1988, and dropped in 1989 (26%).

4. Who is more likely to move for summary judgment: plaintiffs or defendants?

More motions are made by defendants than by plaintiffs, especially in tort and civil rights cases. In 1988, defendants filed 94% of the summary judgment motions in tort cases and 78% of the motions in civil rights cases. Defendants also filed 68% of the motions in "other" miscellaneous cases.[5] In contract cases motions were evenly divided between plaintiffs and defendants.

5. Are motions for summary judgment more likely to be granted now than in the time period preceding the trilogy?

The rate at which summary judgment motions are granted has increased over the years, but not significantly. Approximately 33% of the motions by plaintiffs and 44% of the motions by defendants were granted in whole or in part in 1975. In 1988, the rates were approximately 35% and 47%, respectively.

6. How often are summary judgments appealed?

The rate of appeal cannot be determined with precision. Assuming that all cases in which a motion for summary judgment was granted were eligible for appeal, approximately 30% of the summary judgments were appealed (in 1986 and 1988, the two years for which we have data). Appeals from summary judgment were more common in civil rights cases and the "other" miscellaneous cases (41% and 36%, respectively) and less common in contract and tort cases (18% and 24%, respectively). From another study currently being undertaken by the Center, we know that 19% of civil cases adjudicated on the merits are appealed.

7. How often are appeals from summary judgments reversed?

The perception that summary judgments are reversed at a higher rate than decisions in other civil cases does not appear to be supported by the available data. Summary judgments are reversed at a rate close to that of other civil cases. In the Second and Ninth Circuits during the two-year period ending in June 1989, the study showed that 19% of all appeals from summary judgments were reversed. During this same period approximately 15% of all civil appeals in those circuits were reversed. This validates the finding of a previous Second Circuit study

that the rate of reversal in appeals from summary judgments is approximately the same as the rate in all civil appeals,[6] and demonstrates a similar effect as a Ninth Circuit study that measured affirmance rates.[7]

What accounts for the perception that the courts of appeals are hostile to summary judgment? One factor is what these courts have said.[8] Another factor is that reversals of summary judgment are more likely to be published than affirmances. While there is concern that appellate courts often find that issues of disputed material fact existed where district judges found none, our study indicates that most reversals are based, not on a misapplication of the summary judgment standard, but on a pure question of substantive law. For example, of the forty-nine summary judgment reversals by the Second Circuit Court of Appeals during the two-year period ending June 1989, only thirteen were based on the existence of a triable issue.

Implications of the Role of Summary Judgment

The increasing rate at which motions for summary judgment were filed from 1975 refutes the notion that summary judgment was regarded as an ineffective procedural device. Before 1986, when summary judgment was often thought to be underused, the frequency of motions for summary judgment had been increasing, especially in tort and civil rights cases, occurring in more than 20% of tort and 30% of civil rights cases.

The most surprising finding of this study is the absence of a significant overall increase in summary judgment activity in the period following the trilogy. In general, the shift or clarification in summary judgment doctrine, initiated by the Supreme Court and generally followed in the courts of appeals, did not produce a general increase in summary judgment activity in the district courts examined in this study.

Perhaps motions for summary judgment were suppressed in 1988 and 1989 as an incidental effect of simultaneous increases in sanctioning behavior under Rule 11 of the Federal Rules of Civil Procedure. To an extent, sanctions under Rule 11 and the new standards for a summary judgment motion are designed to achieve the same purpose — to spare the court the burden of resolving claims and defenses that have no basis in fact. Since the Rule 11 inquiry should inform the party of facts that will support the primary elements of the case, the possibility of sanctions may deter the filing of some cases that, if they were to survive a motion to dismiss, would become candidates for a motion for summary judgment.[9] While verification of such a possibility is beyond the scope of this study, such an explanation could account for the

lower level of summary judgment activity in the Northern District of Illinois, a district that has a reputation as being forceful in the use of sanctions under Rule 11.[10]

Perhaps the effect of the trilogy has been concentrated in categories of cases that are narrower than the classifications used in these analyses. In the subcategory of product liability cases, for example, the rate of filing of summary judgment motions increased from 24% in 1986 to 41% in 1989. While the few cases in this study's sample do not permit an accurate assessment of this trend, such an effect would be consistent with reports of summary judgments playing a larger role in product liability and toxic tort litigation.[11] This study did not attempt to identify whether the trilogy encouraged greater summary judgment activity in some categories of cases and not in others. Inquiry into such a possible effect, and examination of the substantive, evidentiary, or other analytical components that may make some types of cases more suitable for summary judgment, are matters that deserve closer analysis.

Notes

1. *See, e.g.,* Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 Ohio St. L. Rev. 95, 107–08 (1988) ("Although system-wide empirical data is not readily available, it seems likely that the momentum of these cases, particularly *Liberty Lobby,* is having an effect on federal court practice, making summary judgment easier to obtain and involving trial judges in more activities that look suspiciously like pretrial factfinding."); Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court,* 37 Emory L.J. 171 n.9 (1988) ("The impact of the three Supreme Court 1986 cases discussed above is fairly clear. Courts will adopt a considerably more permissive posture toward the summary judgment motion after the Supreme Court has so clearly articulated the merits of using the rule which had historically been the source of so much controversy."); Pierce, *Summary Judgment: A Favored Means of Summarily Resolving a Dispute,* 53 Brooklyn L. Rev. 279, 279 n.1 (1987) ("[T]he summary judgment motion should play an increasingly significant role in the summary disposition of cases in the federal courts in the future."); Vairo, *Through the Prism: Post-Trilogy Summary Judgment Practice* 31 (paper presented at the Workshop for Newly Appointed District Judges, Federal Judicial Center, Nov. 16, 1987) ("There can be little doubt, in light of Justice Rehnquist's rhapsodic praise of summary judgment in *Celotex,* that the Court's opinions are designed to remove whatever chill exists in the aggressive use of Rule 56."); Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court,* 116 F.R.D. 183, 184 (1987) ("The result [of the trilogy of cases], though said to be the application of traditional procedural rules, will necessarily pump new life into the motion and free its use in certain contexts. The discouraging words may become the exception rather than the rule."); Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?,* 63 Notre Dame L. Rev. 770, 771 (1988) ("The net effect [of the trilogy of cases] should be the more widespread granting of summary judgment in those cases in which it is justified").

Not everyone expects increased resort to

summary judgment motions. Some commentators have questioned whether the standards announced in the trilogy are sufficiently clear to permit effective use of summary judgment. *See, e.g.,* Mullenix, *Summary Judgment: Taming the Beast of Burdens,* 10 Am. J. Trial Advoc. 433, 468 (1987) ("With the rule 12(b)(6) motion already in extreme disfavor, the court has effectively deadened the pretrial utility of summary judgment — an ironic outcome for a Supreme Court urgently concerned with congested federal dockets and increased frivolous litigation."); Note, *Summary Judgment and the ADEA Claimant: Problems and Patterns of Proof,* 21 Conn. L. Rev. 99 (1988) (contending that recent Supreme Court decisions have led to even more confusion regarding summary judgment, rendering it an inappropriate tool for the resolution of age discrimination claims).

2. This study did not attempt to identify reasons for the decline in motions in prisoner litigation. Courts have, however, demonstrated increased concern regarding the due process rights of pro se litigants. *See, e.g.,* Barker v. Norman, 651 F.2d 1107, 1128 (5th Cir. 1981); Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975); Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982). *See also* Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule,* 55 Fordham L. Rev. 1109 (1987). There have also been procedural changes in prisoner litigation. Since 1975, e.g., there has been greater magistrate involvement in these cases. See the jurisdictional amendments to the Federal Magistrate Act of 1968, Pub. L. No. 95-57 (1976). Discovering how, and to what extent, these changes may have contributed to the decline is beyond the scope of this study.

3. Although summary judgment increased in Eastern Pennsylvania by almost four percentage points (13.2% in 1986 to 16.9% in 1988) and in Southern New York by two percentage points (10.8% in 1986 to 12.7% in 1988), these increases were not sufficiently large to meet the standards of statistical significance in a sample this size.

4. While the increase of eleven percentage points in Maryland (19.4% in 1986 to 30.7% in 1988) is statistically significant, a portion of this increase is believed to stem from an increase in the percentage of civil rights and tort cases in the sample of 1988 Maryland cases. Civil rights cases increased from 18% of the sample in 1986 to 30% of the sample in 1988; tort cases increased from 11% in 1986 to 24% in 1988. Motions for summary judgment are relatively more common in those two categories of cases, and their greater representation in 1988 exaggerates the apparent effect of the trilogy. When statistical tests are used to control for such changes in types of cases, no statistically significant increase is found from 1986 to 1988.

5. The 2,176 cases in this miscellaneous "other" category involve a wide range of actions, many arising under federal statutes. The most common type in this category involved the Employee Retirement Income Security Act of 1974 (265 cases), followed by foreclosure cases (262), and securities and commodities exchange cases (179). There were also 198 cases in a general category described as "other statutory actions."

6. Second Circuit Committee on the Pretrial Phase of Civil Litigation, Final Report of the Committee on the Pretrial Phase of Civil Cases 16 (June 1986).

7. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 467 n.9 (N.D. Cal. 1984).

8. Many district judges objected to what they perceived as a narrow interpretation by the courts of appeals of the trial court's authority to enter summary judgment. This conflict was especially visible in the Second Circuit, where for many years Judge Frank's "slightest doubt" test continued to be cited as the proper standard. *See* Goetell, *From the Bench: Appellate Factfinding—And Other Atrocities,* 13 Litigation 7 (1986) ("By finding phantom issues of fact where the parties agree none exist, or by granting the losing party's request for extensive addi-

tional discovery to find such issues, the appellate courts have made summary judgment impotent."); Chubbs v. City of N.Y., 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971) ("On these facts we would be inclined to grant summary judgment. But, in this Circuit, at least, District Courts may not rely to any substantial extent on summary judgment predicated upon testimonial proof to avoid a full trial even though a recovery seems hopeless. . . . The 'slightest doubt' test, if it is taken seriously, means that summary judgment is almost never to be used—a pity in this critical time of overstrained legal resources."); Wells v. Oppenheimer & Co., 101 F.R.D. 358, 359 (S.D.N.Y. 1984) ("As is our custom in such situations, we explored the issues, expressed our view that motions for summary judgment in this [Second] Circuit are usually a waste of time and should be discouraged, and stated that it was, accordingly, our practice to be generous in awarding counsel fees to parties who successfully oppose such motions.") Judge Pierce, who questioned the assertion that the Second Circuit Court of Appeals has been especially harsh in reviewing summary judgments, acknowledged the general perception in citing the statement of a prominent litigator who, when asked about summary judgment, responded, "There is none in this Circuit. . . . It takes a touch of Pollyanna for any of us to even consider the motion any longer." Pierce, *Summary Judgment: A Favored Means of Summarily Resolving a Dispute,* 53 Brooklyn L. Rev. 279 n.1 (1987).

Following the trilogy, the Second Circuit has stated that it does not disfavor summary judgments. *See* Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986) ("It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time.") (Feinberg, C.J.), *cert. denied,* 480 U.S. 932 (1987).

9. For a discussion of the relationship between sanctions under Rule 11 and summary judgment, see Fontenot v. Upjohn, 780 F.2d 1190 (5th Cir. 1986) (a case decided before the trilogy, suggesting that the amendments to Rule 11 may alter the burden imposed on the moving party in summary judgment cases), and Schwarzer, *Summary Judgment, A Proposed Revision of Rule 56,* 110 F.R.D. 213, 219–20 (1986) (distinguishing the standards for Rule 11 sanctions and summary judgment and suggesting that the opportunity for sanctions may discourage abuse of summary judgment).

10. The Northern District of Illinois was one of the courts identified as having a high rate of sanctioning behavior in several studies. *See* Willging, The Rule 11 Sanctioning Process, 179–80 (1988); Nelkin, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment,* 74 Geo. L. J. 1313, 1316 (1986); *and* Vairo, *Rule 11: A Critical Analysis,* 118 F.R.D. 189, 200 (1987). The Northern District of Illinois and the Seventh Circuit Court of Appeals also are among the few courts with reported decisions imposing sanctions on a party moving for summary judgment. Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985); SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984). These cases were decided prior to the Supreme Court trilogy. If these cases led to a perception among members of the bar in the Northern District of Illinois that an unsuccessful motion for summary judgment will leave the attorney or the party open to sanctions under Rule 11, they also may have discouraged summary judgment activity.

11. Rothstein & Crew, *When Should the Judge Keep Expert Testimony from the Jury?,* 1(6) Inside Litigation 19 (April 1987); Viterbo v. Dow Chemical Co., 826 F.2d 420 (5th Cir. 1987); Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment,* 22 U. Cal. Davis L. Rev. 93 (1988).